Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 On Petition for Writ of Certiorari from the Colorado Court of Appeals, Opinion issued by Judge Fox, (Judge Tow and Judge Yun concurring) Case No. 21CA2032: Denver County District Court No. 20CV32320 Honorable Christopher J. Baumann, Judge ENVIRONMENTAL DEFENSE FUND and WILDEARTH GUARDIANS, Petitioners, v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, COLORADO AIR QUALITY CONTROL COMMISSION, and COLORADO AIR POLLUTION CONTROL DIVISION, Respondents, and PUBLIC SERVICE COMPANY OF COLORADO, Intervenor-Respondent. *Attorney for Petitioners* Reed Zars, Attorney at Law 910 Kearney Street Laramie, WY 82070 307-760-6268 reed@zarslaw.com CO Atty. Reg. # 17627	□ COURT USE ONLY □ Court of Appeals Case Number: 21CA2032 District Court Case Number: 20CV32320 County: Denver
PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32 and 53, including all formatting requirements. The brief complies with C.A.R. 53(a) because it contains 3,387 (less than 3800) words and (1) an advisory listing of the issues presented for review; (2) a reference to the official or unofficial reports of the opinion of the court; (3) a concise statement of the grounds on which jurisdiction of the Supreme Court is invoked; (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons for the allowance of the writ; and (6) an appendix including a copy of the opinion delivered upon the rendering of the decision of the court of appeals.

s/ Reed Zars
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INTRODUCTION

In 2019, the General Assembly passed a landmark initiative to reduce statewide greenhouse gas (GHG) pollution 26 percent by 2025, 50 percent by 2030, and 90 percent by 2050. The legislative package represented an historic effort to protect the state's citizens, economy and environment from the impacts of climate change. The linchpin to the success of the initiative was the requirement that Colorado's Air Quality Control Commission (AQCC) propose within 13 months, and thereafter timely promulgate, regulations that would allow the state to meet the 2025, 2030, and 2050 emission reduction targets.

In a significant departure from this Court's precedents, a panel of the court of appeals removed the 13-month proposal deadline from the General Assembly's legislation, finding it both absurd and ambiguous. But because the plain meaning and purpose of the 13-month deadline was clear, and its prioritized pace far from being absurd or "so gross as to shock the general moral or common sense," the Court should grant certiorari to review the panel's judicial override of legislative intent. This case presents the first opportunity for this Court to review Colorado's landmark climate legislation, and the only opportunity to restore its linchpin that has been removed.

ISSUE PRESENTED FOR REVIEW

Whether the Colorado Court of Appeals erred in finding, as both absurd and ambiguous, the express statutory deadline by which the AQCC was to propose regulations necessary to reduce statewide greenhouse gas pollution to required levels.

OPINION BELOW

Petitioners seek review of *Environmental Defense Fund et al. v. Colorado Department of Public Health & Environment et al.*, No. 21CA2032 (Nov. 3, 2022).

JURISDICTION OF THE SUPREME COURT

This Court has the jurisdiction to grant certiorari review pursuant to C.A.R. 49 and § 13-4-108, C.R.S. No motion for rehearing was filed in the Court of Appeals and no extension of time has been granted to petition for writ of certiorari.

STATEMENT OF THE CASE

In 2019, the General Assembly passed a series of bills amending and adding to the Colorado Air Pollution Prevention and Control Act, aimed at addressing and reducing GHG emissions in Colorado. Specifically, C.R.S. § 25-7-102(2) ("Section 102"), set out state GHG abatement goals of 26% by 2025, 50% by 2030, and 90% by 2050. Section 25-7-105 ("Section 105"), among other things, identified factors to be taken into consideration in formulating rules to meet these GHG reduction goals. Finally, § 25-7-140 ("Section 140") imposed deadlines on the AQCC, including the

requirements that, by June 1, 2020, the AQCC adopt rules requiring entities to report their greenhouse gas emissions, and that, by July 1, 2020, the AQCC propose rules that would allow the state to meet its 2025, 2030 and 2050 GHG reduction goals in Section 102.

Notwithstanding this directive, the AQCC (concededly) failed to propose rules by the July 1, 2020 deadline that would achieve anywhere near the level of reductions necessary for the state meet its GHG reduction goals. Following consolidated lawsuits to enforce the deadline by EDF and WildEarth Guardians, the Denver District Court granted summary judgment to the AQCC, finding Section 140(2)(a)(III) ambiguous and adopting the defendants' interpretation that it only required the AQCC to start – but not complete – the process of proposing rules by the specified deadline. Under that interpretation, the District Court concluded that the modest steps the AQCC had taken by July 1, 2020—and, even more narrowly, AQCC's state-level GHG reporting requirements adopted in its Regulation 22—adequately discharged its statutory duty.

On December 18, 2021, EDF filed a notice of appeal in the court of appeals. After oral argument, on November 3, 2022 the court of appeals affirmed the district court's judgment, concluding that Section 140(2)(a)(III) merely requires the AQCC "to propose rules that implement measures . . . related to data collection and the corresponding statewide inventories." *See* Opinion pp. 8-12, ¶¶ 18-25. According to

the court of appeals, a requirement to propose more-comprehensive, GHG-reduction rules by July 1, 2020, would have led to "absurd results" because there would have been insufficient time for the agencies to conduct statutorily required outreach, to consider independently mandated Clean Energy Plans for the power sector, and to collect and compile GHG emissions data before July 1, 2020. *Id.* at 13-14, ¶¶ 26-28. EDF now files this petition for writ of certiorari.

PRESERVATION AND STANDARD OF REVIEW

This Court reviews the court of appeals' decision de novo. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010). Petitioners preserved the issue presented for review in both the district court and the court of appeals.

REASONS FOR GRANTING REVIEW

In Interpreting Section 140(2)(a)(III), the Court of Appeals Departed from this Court's Precedents on Ambiguity and Absurdity, Overriding a Clear Legislative Deadline.

The linchpin to the General Assembly's bold GHG reduction plan is set forth in a single sentence at § 25-7-140(2)(a)(III), C.R.S. Section 140(2)(a)(III) reads in its entirety:

> By July 1, 2020, [the AQCC shall] publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals.

§ 25-7-140(a)(III), C.R.S. The "greenhouse gas emission reduction goals" to which this section refers are found at Section 102(2)(g):

> Colorado shall strive to increase renewable energy generation and eliminate statewide greenhouse gas pollution by the middle of the twenty-first century and have goals of achieving, at a minimum, a twenty-six percent reduction in statewide greenhouse gas pollution by 2025, a fifty percent reduction in statewide greenhouse gas pollution by 2030, and a ninety percent reduction in statewide greenhouse gas pollution by 2050.

§ 25-7-102(2)(g), C.R.S.

When interpreting statutes, Colorado courts "look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and [ ] apply words and phrases in accordance with their plain and ordinary meanings." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12 (quotation omitted). "Absent some ambiguity in the language of the statute," Colorado courts "do not resort to any further rules of statutory construction." *People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004).

According to this Court in *State v. Nieto*, "when construing a statute, courts must ascertain and give effect to the intent of the General Assembly, and must refrain from rendering judgments that are inconsistent with that intent." 993 P.2d 493, 500 (Colo. 2000) (internal citations omitted). "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written,

giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said." *Id.* A statute is ambiguous where "the words chosen by the legislature are unclear in their common understanding, or capable of two or more constructions *leading to different results*." *Id.* at 500-01 (emphasis added).

Finally, in *Smith v. Exec. Custom Homes, Inc.*, this Court stated that "a harsh or unfair result will not render a literal interpretation absurd," and that a court should only "deviate from the plain language of a statute to avoid an absurd result . . . where a literal interpretation of a statute would produce a result contrary to the expressed intent of the legislature." 230 P.3d at 1191. Succinctly stated, "the resultant absurdity must be so gross as to shock the general moral or common sense." *Id.* (quoting *Dep't of Transp. v. City of Idaho Springs*, 192 P.3d 490, 494 (Colo. App. 2008) & *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

The Appeals Court departed from this Supreme Court precedent, finding that a literal interpretation of Section 140(2)(a)(III) would lead to absurd results, and that two phrases within it were ambiguous. Opinion, pp. 8-16, ¶¶ 17-30.

1. Enforcement of Section 140(2)(a)(III) as written would not lead to absurd results

Turning first to the Appeals Court's determination that it would be absurd to enforce Section 140(2)(a)(III) as written, the Division did not mention or abide by the high bar established in *Smith*. Without a full appreciation of the applicable standard,

the Division proceeded to illustrate three examples of absurdity, all of which were without either factual or legal foundation, and none of which were close to shocking the general moral or common sense.

The Division first opined that it would be absurd to interpret Section 140(2)(a)(III) as requiring the AQCC to propose rules to allow the state to meet the GHG reduction goals by July 1, 2020, noting that would mean the pre-proposal stakeholder engagement process would have to occur in a "mere thirteen months." Opinion p. 13, ¶ 27.

Strikingly, there is no admitted or admissible fact in the record that supports the suggestion that thirteen months was an insufficient time to conduct the stakeholder engagement process. This untethered vision of the sky falling in no way warranted the Division's judicial repeal of Section 140(2)(a)(III). *See Dep't of Revenue v. Agilent Techs., Inc.,* 2019 CO 41, ¶ 44 ("[A]lthough the Department posits that a parade of horribles will follow the statutory interpretation that we have adopted today, it has offered no evidence to support such dire predictions, and we have seen none."). And there was no finding by the Division that "a mere thirteen months" was such a patently inadequate period of time to propose rules necessary to meet the GHG reduction goals that it would shock the general moral or common sense.

The Division next decided that to enforce a literal interpretation of Section 140(2)(a)(III)'s July 1, 2020 rule proposal deadline would lead to an absurd result because certain utility clean energy plans, supposedly necessary to the rulemaking effort, were not due until 17 months after that deadline. Opinion p. 14, ¶ 27; *see* C.R.S. § 25-7-105(1)(e)(VIII)(J).

The Division's reasoning, however, was based on a false premise. Contrary to the Division's assumption, C.R.S. § 25-7-105(1)(e)(VIII)(J) does not require any utility to file a clean energy plan that could influence the Agencies' initial rulemaking. Instead, by its own terms, C.R.S. § 25-7-105(1)(e)(VIII)(J) only provides a deadline for smaller utilities to file voluntary plans.

To put it simply, voluntary utility clean energy plans are not a prerequisite to the AQCC's rulemaking, and to the extent those voluntary plans produce subsequent GHG emission reductions, the AQCC is authorized to revise its rules accordingly. *See id.* § 25-7-105(1)(e)(II) (implementing rules "shall be revised as necessary over time to ensure timely progress toward the 2025, 2030, and 2050 goals"). The Division's example is premised on a mistake of law, and falls well short of the standard in *Smith* for finding a legislative act absurd.

The Division's third example, of what it called "the most fundamental absurdity," is its view that a literal reading of Section 140(2)(a)(III) would require a

notice of proposed rulemaking before the defendant agencies were "able to collect and establish a robust data inventory on the existing status of GHG emissions statewide." Opinion p. 14, ¶ 28. The Division's claim of insufficient GHG emission data, however, overlooks the fact that Section 140(2)(a)(III) had already been inoculated against such a charge of fundamental absurdity by its own legislative declaration. There, at Section 140(1)(a), the General Assembly found,

> **(I)** Greenhouse gas emissions reporting requirements were first established in Colorado in 2008 with executive order D 004-08. The policies established by this executive order were continued under the next governor and require the department of public health and environment to report every five years on estimates of greenhouse gas emissions by sector. The last report by the department was issued in 2014 and the next report is due in 2019.

Thus, Colorado already had a GHG emissions inventory, periodically complied pursuant to Executive Order (EO) #D-004-08. There is no fundamental absurdity due to the lack of GHG emission data, because the statute itself acknowledges the preexisting inventories and presence of sufficiently robust data to inform the AQCC's rulemaking. Moreover, Section 140(5) states that "nothing in this section . . . shall be construed to slow, interfere with, or impede state action to timely adopt rules that reduce greenhouse gas emissions to meet the state's greenhouse gas emission reduction goals." Accordingly, the requirement to issue a proposed rule before the

updated inventory is complete would not produce an absurd result "contrary to the expressed intent of the legislature," *Smith*, 230 P.3d at 1191.

2. Section 140(2)(a)(III) is not ambiguous

The Division's conclusion that Section 140(2)(a)(III) is ambiguous also departed from Supreme Court precedent. According to *Nieto v. Clark's Market*, to be ambiguous a statute must be "reasonably susceptible to more than one interpretation." 2021 CO 48, ¶ 13. Moreover, these two or more constructions must lead "to different results." *State v. Nieto*, 993 P.2d at 500. Contrary to the Division's determination, the phrases "allow the state to meet" and "implement measures" in Section 140(2)(a)(III) are not reasonably susceptible to more than one interpretation leading to different results.

To find the phrase "allow the state to meet [its greenhouse gas emission reduction goals]" susceptible to two meanings, the Division found a distinction between the synonymous phrases "sufficient to meet" and "make it possible to meet" as follows:

> Whereas rules that are "sufficient" *would be enough* to meet the state's GHG emission reduction goals, rules that "make it possible" *may be enough* to meet those goals.

Opinion p. 9, ¶ 20 (emphasis in original).

The Division's distinction, however, fails to establish an ambiguity because the two phrases are essentially the same; they lead to the same results. This is because, under either formulation, the AQCC was not tasked with proposing rules *that themselves* would "be enough" to meet the GHG reduction goals, but simply to propose rules that would ensure that the goals are met after "taking into account" other GHG reducing regulations and voluntary actions that have produced quantifiable emission reductions as required by § 105(1)(e)(II). A different formulation—one that the General Assembly did not use—could have required the AQCC to propose rules that would be enough in themselves. For example, a requirement to propose rules "to cause" the state to meet the goals could have been such a formulation. But because the Commission was to ensure the goals would be met through its own regulations *while taking into account* the actions of others, "to allow" or "to make possible" was the better and more precise choice of words, and its plain meaning should have been enforced.

The Division also departed from Supreme Court precedent by deeming the phrase "implement measures" in Section 140(2)(a)(III) ambiguous.

The term "measures" in Section 140(2)(a)(III), defined in the dictionary as "step[s] planned or taken as a means to an end,"[1] plainly refers to actions to reduce

[1] *See* https://www.merriam-webster.com/dictionary/measures.

GHG emissions in order to meet the state's GHG emission reduction goals. The term "measures" is used only in §§ 102, 105 and 140 in reference to actions that reduce emissions and never in reference to data collection. Because GHG emissions monitoring and reporting do not reduce emissions, these activities are not "measures" within the meaning of that term in § 140(2)(a)(III). It was unreasonable for the Division to read "measures" otherwise.

3. The Court of Appeals ignored key statutory context in finding that Section 140(2)(a)(III) is ambiguous and could refer to rules to collect and report data

Colorado courts "look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts." *Nieto v. Clark's Market*, 2021 CO 48, ¶ 12 (quotation omitted). And courts need not defer to a reasonable agency interpretation if a better interpretation is available. *See id.* ¶ 38 ("[W]hile agency interpretations should be given due consideration, they are not binding on the court." (quotation omitted)). The Division disregarded these fundamental principles in concluding that Section 140 is ambiguous and may deal exclusively with GHG reporting issues, overlooking key statutory context.

First, the Court of Appeals ignored textual evidence within Section 140 itself that strongly indicates that Section 140(2)(a)(III) is not focused on reporting requirements. The Court concluded that "section 25-7-140(2)(a)(III) requires the

Commission to propose rules that implement measures related to data collection and the corresponding statewide inventories." Opinion p. 12, ¶ 25. Crucially, however, another provision of Section 140 as enacted—and since removed once it had been fulfilled—imposed a deadline on the *promulgation* of the reporting rule one month before the deadline for the *proposal* required under Section 140(2)(a)(III).[2] It would be nonsensical for the General Assembly to have required proposal of the reporting rules a month after it had required their promulgation.[3] The Court of Appeals reading fails to interpret these provisions in context and as a harmonious whole.

Second, the Court of Appeals did not consider how other, related statutory provisions use the words "measures" and "implement" in concluding that these terms, within Section 140(2)(a)(III), refer solely to data collection measures. Opinion p. 10, ¶ 22. For instance, the contemporaneously enacted Section 105(1)(e)(IV) refers to "statewide greenhouse gas pollution mitigation measures," while Section 25-7-140(1)(a)(II)(C) includes "energy-efficiency measures." Section 140(2)(a)(I) calls for reporting requirement that will "facilitate implementation of rules that will timely achieve Colorado's greenhouse gas emission reduction goals." Nothing in these

[2] *See* S.B. 19-096, § 1 (enacting C.R.S. § 140(2)(a)(I), with a deadline of adopting GHG reporting rules by June 1, 2020).

[3] *Cf. People ex rel. L.M.*, 2018 CO 34, ¶ 37 ("Reading the pertinent provisions as the Department suggests, at least when a dependency and neglect proceeding under Article 3 is already pending, could result in parallel termination proceedings with different procedural requirements.").

closely related provisions suggests that the phrase "implement measures" in Section 140(2)(a)(III) could mean measures that do not reduce GHG emissions.[4]

Third, the Court of Appeals misunderstood how Section 140(2)(a)(III) functions within the larger statutory scheme. Opinion p. 11, ¶ 24 (citing the legislative declaration within Section 140). While it is true that Section 140 opens with a legislative declaration discussing GHG monitoring,[5] this does not, by itself, narrow the provision beyond any ability to address GHG abatement policy. In fact, the provision in its entirety, and the structure of the broader statute, make clear that Section 140 is dedicated to GHG abatement policy as well as data collection. For one thing, Section 140 refers throughout to the GHG emissions goals introduced in Section 102—which itself is located in a legislative declaration that applies to the

[4] *Cf. Ford Motor Co. v. Walker*, 2022 CO 32, ¶ 98 (Márquez, J., dissenting) ("For the majority's reading to work, the word 'judgment' must have two different meanings within the same phrase of the same sentence."); *McCulley v. People*, 2020 CO 40, ¶ 32 ("[C]onstruing 'conviction' in section - 113(3)(c) not to include successfully completed deferred judgments ensures that the words 'conviction' and 'convicted' have a consistent meaning throughout subsection (3).").

[5] C.R.S. § 25-7-140(1)(a)(I)states: "The general assembly hereby finds that Greenhouse gas emissions reporting requirements were first established in Colorado in 2008 with executive order D 004-08," and C.RS. § 25-7-140(1)(b) continues: "[The legislature] declares that it is in the state's interest to leverage data collected and analyses conducted for its greenhouse gas emissions inventories and forecasts and make data sets available to local governments."

entirety of Article 7, to which Section 140 also belongs.[6] For another, Section 140(5) states, in closing: "[t]his section is intended to facilitate prompt state action to address greenhouse gas emissions and nothing in this section or the emissions inventory provisions in section 25-7-102 shall be construed to slow, interfere with, or impede state action to timely adopt rules that reduce greenhouse gas emissions to meet the state's greenhouse gas emission reduction goals." And, contrary to the Court of Appeals' opinion, Opinion p. 12, ¶ 26, the deadline to propose regulations in Section 140(2)(a)(III) in no way conflicts with a requirement to promulgate those very regulations in a "timely" fashion in Section 105(1)(e)(II).

CONCLUSION

Because the Court of Appeals departed from established Colorado Supreme Court precedents as demonstrated above, Petitioner EDF respectfully requests its Petition for Writ of Certiorari be granted.

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[6] *Cf. People ex rel. L.M.*, 2018 CO 34, ¶17 ("The General Assembly designed Article 5, in contrast, 'to promote the integrity and finality of adoptions to ensure that children placed in adoptive placements will be raised in stable, loving, and permanent families.' . . . To this end, the legislature adopted a number of provisions to ensure an expedited adoption process in cases arising under this Article.").

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR CERTIORARI** was served this 15th day of December, 2022, by CCE e-filing procedures on the following:

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